FCC 95-145

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 73 of the	)	MM Docket No. 95-40
Commission's Rules concerning the	)	
Filing of Television Network	)	
Affiliation Contracts	)	
	)	

NOTICE OF PROPOSED RULE MAKING

Adopted: April 5, 1995 Released: April 5, 1995

Comment Date: June 12, 1995
Reply Comment Date: July 12, 1995

By the Commission:

I. INTRODUCTION

1. With this Notice of Proposed Rule Making (NPRM), the Commission continues its examination of rules regulating broadcast television network/affiliate relations in light of changes in the video marketplace. In our recent Report and Order in MM Docket No. 91-221, FCC 95-97 (adopted and released March 7, 1995), we eliminated 47 C.F.R. §73.658(f) (the network station ownership rule) and 47 C.F.R. §73.658(l) (the secondary affiliation rule). This NPRM proposes repeal or modification of 47 C.F.R. §73.3613(a) (the "filing of affiliation contracts" rule).[1] This rule requires television broadcast licensees to file copies of

[1] 47 C.F.R. § 73.3613 states that "[e]ach licensee or permittee of a commercial or noncommercial . . . TV . . . broadcast station shall file with the FCC copies of the following contracts, instruments, and documents together with amendments, supplements, and cancellations (with the substance of oral contracts reported in writing), within 30 days of execution thereof:

(a) Network service: Network affiliation contracts between stations and networks will

network affiliation contracts, agreements, and understandings with the Commission. The contract must be reduced to one written document, including the substance of any oral agreements, without reference to any other document. However, the rule does allow subsequent renewals, changes, or amendments to the contract to be set forth in separate filings that refer to the original contract. Notification of cancellation or termination of the filed contracts is also required. This rule applies only to agreements with broadcast television networks that offer 15 or more hours of programming per week to 25 or more affiliates in 10 or more states. Thus, while ABC, CBS, NBC, and Fox are subject to the rule, the United Paramount Network and the Warner Brothers Network are not.

II. BACKGROUND

2. The Commission used specific contractual terms contained in network affiliation agreements as the basis for the first broadcast radio network rules, set forth in the 1941 Report on Chain Broadcasting.[2] Key to the Commission's analysis were both the actual manner in which these terms were being used against the public interest,[3] and, in instances where the term had not been so abused, the hypothetical effects of such use in the future.[4] In adopting these rules, the Commission also for the first time determined that it had jurisdiction to regulate network/affiliate contractual relationships.[5] The affiliation agreements

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be reduced to writing and filed as follows:

(1) All network affiliation contracts, agreements, or understandings between a TV broadcast or low power TV station and a national network. . .

(2) Each such filing ... initially shall consist of a written instrument containing all of the terms and conditions of such contract, agreement or understanding without reference to any other paper or document by incorporation or otherwise. Subsequent filings may simply set forth renewal, amendment or change, as the case may be, of a particular contract previously filed in accordance herewith.

(3) The FCC shall be notified of the cancellation or termination of network affiliations, contracts for which are required to be filed by this section."

[2] Report on Chain Broadcasting, Commission Order No. 37; Docket 5060 (May, 1941), modified, Supplemental Report on Chain Broadcasting (October, 1941), appeal dismissed sub nom. NBC v. United States, 47 F. Supp. 940 (1942), aff'd, 319 U.S. 190 (1943).

[3] E.g., Id. at 35-36, 51 (discussing the negative effects that exclusive affiliation agreements were having on the public interest).

[4] E.g., Id. at 74 (noting that no network had ever enforced its contractual right to set an affiliate's advertising rates).

[5] Id. at 80-87.

were generally not made available for public inspection.[6] The Commission subsequently applied the network radio rules to television in 1946.[7]

3. In 1955, the Commission initiated a general inquiry into television network broadcasting that culminated in the 1957 Barrow Report.[8] This report recommended that affiliation agreements be made available for public scrutiny. The Barrow Report argued that each affiliate should know the contents of all of its network's other affiliation agreements, just as the network does, thereby placing both into an equitable bargaining position. The intended result would be to make all of a network's affiliation compensation rates more similar, as the Report claimed that favored treatment of group station owners might discourage local ownership of television stations. Specifically, it found that networks were agreeing to better contract terms with group owners because of the opportunities they offered to increase the number of affiliated stations in other markets. It added that the varying rates often reflected agreements regarding the level of program clearance.[9] The Barrow Report concluded that, without guaranteed secrecy from both its competitors and the Commission, the networks would not likely pursue contract terms that violated the public interest. It therefore asserted that continued Commission monitoring, combined with mandated public disclosure of affiliation agreements, was required to prevent such practices as undue rate favoritism to group owners, exclusive affiliation agreements, network use of option time, and network control of the affiliate's advertising rates.[10] The Commission initiated a proceeding four years later, focusing on public inspection of affiliation agreements.[11] However, the Barrow Report's recommendations were not acted upon, in part because a subsequently passed statute delayed the proceeding.

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[6] See Report and Order in Docket No. 14710, 15 RR 2d 1579, n. 1 (1969) (Public Inspection of Affiliate Agreements), citing Order in Docket No. 6572, August 2, 1945.

[7] Rules Governing Television Broadcast Stations, 11 Fed. Reg. 33, 37 (January 1, 1946).

[8] Network Broadcasting, Report of the Network Study Staff to the Network Study Committee (Oct. 1957), reprinted in Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1297, 85th Congress, 2nd Sess. (1958) (the Barrow Report).

[9] Id. at 462-66.

[10] Id. at 467-68. The Commission had prohibited these practices in 1941 for radio networks and affiliates, based on its conclusion that they allowed a network to exert undue influence over its affiliate, thereby limiting licensee discretion and local programming. Report on Chain Broadcasting, passim.

[11] Notice of Proposed Rulemaking in Docket No. 14710, FCC 62-745 (released July 16, 1962).

4. In 1967, Congress enacted the Freedom of Information Act (FOIA),[12] prompting the Commission to review its policies regarding the disclosure of various filings, including those of affiliation contracts. FOIA placed the burden of justifying nondisclosure on the government. In response to this statute, the Commission, continuing the proceeding initiated after the Barrow Report, sought additional comment on public inspection of affiliation agreements.[13] It analyzed whether network affiliation agreements were privileged and confidential, and thus statutorily exempt from the mandatory disclosure requirement. Almost all commenters in the proceeding, including networks and affiliates, opposed lifting the prohibition against public access. They stressed that dissemination of contract terms, especially those regarding rate compensation, would constitute a serious competitive injury. Commenters predicted that, with the publication of contract terms with affiliates in favored, more valuable markets, other affiliates would demand equal treatment. This, they claimed, would damage the networks' negotiating abilities.[14]

5. The Commission held that these claims were "exaggerated,"[15] noting that the higher value placed on affiliates in certain markets "w[ould] not ... come as a shock or even be 'news' to their competitors."[16] Further, according to the Commission, any likely costs of the new rule were outweighed by the public interest benefits of disclosure, because the public had a right to know the terms under which network service was provided. Disclosure, the Commission held, would also moderate the substantial variety in contract terms being negotiated throughout the country. It shared the concern of the Barrow Report that contract terms favoring group owners discouraged local ownership.[17] In its analysis, the Commission noted the conclusions of a Congressional subcommittee that, overall, network affiliation agreements seemed arbitrarily to favor multiple-station owners over smaller, independent entities,[18] and it cited the Barrow Report's similar finding.[19] Therefore, the Commission

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[12] Public Information Amendments to the Administrative Procedure Act, 5 U.S.C. § 552.

[13] Order in Docket No. 14710, FCC 68-954 (released September 20, 1968).

[14] Report and Order in Docket No. 14710, 15 RR 2d 1579 (1969) (Public Inspection of Affiliation Agreements).

[15] Id. at 1585.

[16] Id. at 1586.

[17] Id. at 1582-85.

[18] Id. at 1581, citing Report of Antitrust Subcommittee of House Committee on the Judiciary, 85th Cong., 1st Sess., March 13, 1957.

lifted the public access restriction in 1969 and made the filings publicly available at the Commission. Further, to facilitate inspection, all agreements had to be reduced to one document.[20]

6. In 1977, following a comprehensive review of its AM and FM radio network rules, the Commission made several rule changes. Although many of the radio network rules were abolished, the required filing of commercial network affiliation contracts was retained for those networks furnishing programming to affiliated stations at least five days per week during eight or more months per year, as stations with less network programming were unlikely to be unduly influenced by that network.[21] The Commission eliminated the filing requirement for "occasional" networks (e.g., seasonal sports networks), thus reducing the paperwork burden for some licensees. The Commission maintained the requirement for "regular" interconnected networks because "[t]hese entities are of too great importance for us to dispense with having this information readily available."[22] The television network rules were not addressed in that proceeding.

7. In 1985, the Commission eliminated the affiliation contract filing requirement for all radio licensees but retained the requirement for television licensees that are affiliated with national networks.[23] In eliminating the radio filing requirement, the Commission observed that there were over 3,400 radio stations affiliated with one or more of the over 100 networks. With such a significant number of program sources and choices, in addition to locally originated programming, the Commission found it unlikely that any one program source could exercise undue influence over any particular radio station. This evolution eliminated the need to collect and monitor affiliation agreements, and, coupled with the review required by the Paperwork Reduction Act and Regulatory Flexibility Act,[24] led the

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[19] Public Inspection of Affiliation Agreements at 1584, n. 9.

[20] Public Inspection of Affiliation Agreements at 1588. The Commission adopted the one-document requirement in one sentence, with no further elaboration.

[21] See Report, Statement of Policy and Order in Docket No. 20721, 63 FCC 2d 674 (1977).

[22] Id. at 688.

[23] Report and Order in MM Docket 85-5, 101 FCC 2d 516 (1985) (Radio Network Affiliation Agreements).

[24] The Paperwork Reduction Act (44 U.S.C. §§ 3501 et seq.) and the Regulatory Flexibility Act (5 U.S.C. §§ 601 et seq.) impose responsibilities on regulatory agencies to ensure that the benefits of continued governmental regulation outweigh the costs associated with such regulation. In the Notice of Proposed Rulemaking initiating the 1985 proceeding, the Commission had stated that the filing requirement annually placed a paperwork burden of

Commission to abolish the filing requirement for radio licensees.

8. With respect to television licensees, the Commission stated that the number of national networks and program sources was more limited for broadcast television than for radio, and that the amount of national network programming carried by an affiliated television station was considerably more than that carried by an affiliated radio station. Therefore, the Commission believed that there could be significantly more dependence of the affiliate on the national network for programming. In order to ensure that the licensee maintained ultimate control over programming, the Commission determined that closer scrutiny of national network/affiliate relationships was warranted. Accordingly, the filing requirement was retained for affiliates of national networks.[25] However, the Commission eliminated the rule for stations affiliated with regional and other non-national networks, concluding that they more closely parallel radio networks because they provide less programming to their affiliated stations, which are in turn less dependent on them. Consequently, the Commission determined that the filing requirement could be eliminated for affiliates of such networks.[26]

III. ANALYSIS

9. The primary purpose of requiring broadcast television stations to file their affiliation agreements with the Commission has been to give the Commission the ability to monitor these contractual relationships and ensure that the Commission's restrictions on these relationships are not violated in affiliation agreements. Also, by requiring affiliates to file their affiliation agreements with the Commission, the rule may chill any desire to engage in misbehavior, thereby reducing the likelihood that these agreements will contain provisions that violate the Commission's underlying network/affiliate rules.

10. In general, the major purpose of the network/affiliate rules has been to restrict the potential exercise of market power of networks over their affiliates to the detriment of the public. Specifically, the Commission has argued in the past that network control over affiliates is detrimental to the public because such control potentially reduces the diversity of

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approximately 2,500 hours on the broadcast industry, and that the contract terms had become relatively standard in nature. Notice of Proposed Rulemaking in MM Docket No. 85-5, 50 Fed. Reg. 2596 (January 17, 1985) (Radio Network Affiliation Notice).

[25] Radio Network Affiliation Agreements at 519.

[26] Id. at 519-20. The Commission took this opportunity to define national network as that contained in (then) Section 73.658(j)(4) -- "any person, entity or corporation which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states." Id. at 519, n. 7.

programming available to the public, especially local programming.[27] In addition, some of the rules concern not only the potential power of existing networks over their affiliates, but also potential implications for third parties, such as advertisers and potential new networks.

11. Since 1985, when we last examined this rule, the video marketplace has changed dramatically. As pointed out in our recent Further Notice of Proposed Rule Making addressing broadcast television ownership, there has been an increase in the number of broadcast stations available for affiliation with a broadcast network in nearly every market.[28] Moreover, new, aspiring networks have emerged.[29] As a result of these changes, the bargaining positions of broadcast television networks and commercial broadcast television stations have changed and differ market by market. The recent affiliate switches demonstrate the increased competition between broadcast networks for affiliation with broadcast television stations in different markets, and thus suggest that broadcast networks' market power over their affiliates has diminished to some extent.[30]

12. Given the recent increased competition between broadcast networks for affiliates in different markets, we solicit comment on whether or not there is a continuing need for the Commission to monitor network/affiliate relationships through mandatory filings of their affiliation agreements. We also seek comment on the extent to which filing these contracts with the Commission is necessary to deter violations of the network/affiliate rules. If we conclude that routine filing of agreements is not necessary to deter violations of the rules, we could relieve licensees of the duty to file affiliation agreements routinely, and instead simply require the production of such agreements upon Commission request.

13. Separate and apart from the issue of whether contracts should be filed with the Commission is the issue of whether licensees should be required to make these contracts available to the public. Making these agreements publicly available allows the general public to inspect them and to file complaints where abuses of the public interest are discovered. It also allows third parties (e.g., advertisers), whose commercial interests are affected by these agreements, to determine if their interests are harmed by these agreements. We solicit comment on the importance of these purposes and examples of the general public's use of these filings that illustrate the extent of the benefits from making these filings publicly

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[27] Report, Statement of Policy, and Order in Docket No. 20721, 63 FCC 2d 674, 690 (1977).

[28] Further Notice of Proposed Rule Making in MM Docket No. 91-221, 60 Fed. Reg. 6490 (Feb. 2, 1995).

[29] Fox now competes with ABC, CBS, and NBC. Further, United Paramount Network and Warner Brothers Network are beginning to develop as competitors to these networks.

[30] See Julie A. Zier, Fog of war engulfs affiliation battles, Broadcasting & Cable, Dec. 5, 1994, at 50, for a discussion of recent affiliation changes.

available.

14. Turning to the possible costs of the rule, we note that there are direct and indirect costs to be considered. The direct costs of filing these agreements are the additional expenses incurred to prepare and submit the filings to the Commission over the expenses incurred to prepare affiliation agreements for their original purpose. We solicit evidence on the size of these costs incurred by filing affiliates.

15. The indirect costs of filing these agreements are more difficult to quantify, potentially more serious, and a result of our requirement that the filings be publicly available. First, networks must bargain with broadcast stations serving different markets to gain access to their potential audiences through affiliation agreements. As mentioned earlier, the number of potential parties to such contracts differs market by market, but generally represents a few potential parties on either side. By making compensation or other data in these filings publicly available, the Commission may facilitate the ability of parties either seeking or offering affiliation to avoid competition. For example, in markets where there are more commercial stations than broadcast networks interested in seeking affiliation agreements, networks might seek, through parallel action, to lower the compensation they pay potential affiliates and could use the public filings to ensure each party is performing as agreed.[31] Alternatively, in markets where there are more broadcast networks seeking affiliation agreements than commercial broadcast stations available, commercial stations could seek to ensure that the compensation that each of them receives is higher than the compensation any one of them alone was willing to accept. In either example, the public availability of the affiliation compensation data facilitates joint monitoring to ensure similar

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[31] See B. M. Owen and S. S. Wildman, Video Economics, Harvard University Press, (1992) at 166-172 for a discussion of influences on the bargaining position of broadcast television networks and commercial broadcast television stations in negotiating affiliation agreements. For a general overview of the manner in which data dissemination among competitors may facilitate cartel-like behavior, see N.R. Prance, Price Data Dissemination as a Per Se Violation of the Sherman Act, 45 U. Pitt. L. Rev. (1983) at 68-78; see also Donald S. Clark, Price-Fixing without Collusion: An Antitrust Analysis of Facilitating Practices after Ethyl Corp., 1983 Wis. L. Rev. 887, 900-901 ("The exchange of cost, price or other data reduces a firm's uncertainty about rivals' likely or actual behavior. These exchanges therefore may facilitate the achievement of a consensus on price and output levels, and increase confidence that the consensus can be and is being maintained. In addition, the dissemination of certain types of data can facilitate the discovery of secret discounting or other forms of cheating, increase the likelihood of retaliation, and therefore discourage cheating altogether."); see also MCI Telecom. Corp. v. AT&T, 114 S. Ct. 2223, 2233 (1994) for an example of the Commission's concern over this issue.

behavior.[32] The Commission solicits comment on the potential for such behavior in light of current market conditions, estimates of the size of these indirect costs, and their consequences, if any, for viewers.

16. Second, making these filings publicly available alters the dynamic of the contracting process. For example, the requirement reduces a network's ability and willingness to craft contractual arrangements with one affiliate to recognize special market conditions of that affiliate. By way of illustration, a network may discern that a new affiliate requires improved local news coverage in order to compete against other television stations in its market and may wish to help fund such improvement because of the financial constraints that the new affiliate faces. However, the network may be reluctant to do so if its other affiliates can discover such improved or different terms and are likely to demand similar terms. Thus, by requiring contracts to be publicly available, our rules make it less likely that the terms are tailored to best suit the needs of the parties to the contract.[33] Confidentiality of the financial terms of affiliates' contracts would break the linkage between concessions offered to one affiliate and negotiations with other affiliates. Networks would be able to tailor affiliation contracts solely to local conditions with less concern for repercussions in other markets. On the other hand, as the Commission previously concluded, public filing of these contracts enables weaker affiliates to attempt to ensure that they receive comparable or competitive compensation to other affiliates of a network, thereby strengthening their overall financial condition and ability to serve the public. Consequently, we solicit comments on the advantages and disadvantages of a network's being able to tailor its contracts versus affiliates' desire to ensure comparable contracts, particularly in terms of the Commission's competition and diversity concerns.

IV. PROPOSALS

17. We propose to eliminate the filing requirement and require broadcast television stations to make their affiliation agreements available to the Commission upon request. We will adopt this proposal if we conclude that the benefits of continuous monitoring of broadcast television station's affiliation agreements with broadcast television networks no longer exceed their costs. We tentatively conclude that we can continue to enforce our network/affiliate rules through a system of complaint initiated requests for affiliation contract information. Such a system would relieve licensees of the paperwork burden of filing contracts with the Commission, and would reduce the potential anticompetitive effects of general public disclosure. We solicit comment on this tentative conclusion and on whether

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[32] The literature on data dissemination among competitors in the prior reference addresses this point.

[33] The standardization or uniformity of affiliation contracts was noted in Radio Network Affiliation Agreements at 517.

we can rely on affiliates, or members of the public, to file such complaints.

18. Alternatively, we could continue to require contracts to be filed with the Commission, but maintain the confidentiality of the contracts by limiting access to authorized FCC employees. This modification of our rule would allow us to continue to monitor network/affiliate relations to protect the public interest, while at the same time reducing the indirect costs of the current filing requirement which arise from the public availability of these agreements. However, the Freedom of Information Act requires agencies to disclose documents in certain circumstances. Given that we did not exempt these filings from the Freedom of Information Act in our 1969 Public Inspection of Affiliation Agreements, we also solicit comment on whether or not this proposal is a viable option.

19. Another alternative would be to continue the filing requirement but modify it to require that only redacted copies of contracts be made available to the public. These copies would omit any references to the values which determine the affiliate compensation and, possibly, other business sensitive terms. In this way, the public could continue to monitor the issues affecting program diversity in their community and we could continue to monitor the network-affiliate relationship. This option would preserve the benefit of general public scrunity of these agreements, but reduce their potential negative effects on the competition for affiliations.

20. We could, of course, also maintain the rule as it currently stands. We would adopt this option only if we determine that the direct and indirect costs associated with these filings continue to be less than their benefits. We request that comments on the above proposals weigh the benefits and costs in a manner which justifies the particular recommendation a commenter makes.

IV. ADMINISTRATIVE MATTERS

21. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before (June 12, 1995), and reply comments on or before (July 12, 1995). To file formally in this proceeding, you must file an original plus five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554.

22. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission Rules. See generally 47 C.F.R. Sections 1.1202,

1.1203, and 1.1206(a).

23. Additional Information: For additional information on this proceeding, contact Robert Kieschnick (202-739-0770), Paul Gordon (202-776-1653), or Tracy Waldon (202-739-0770), Mass Media Bureau.

V. INITIAL REGULATORY FLEXIBILITY ANALYSIS

24. Reason for the Action: This proceeding was initiated to review and update the Commission's rule concerning the filing of broadcast television network affiliation contracts.

25. Objective of this Action: The actions proposed in this Notice are intended to reduce concerns over the potential deleterious effects of making some or all the substance of broadcast television affiliation agreements publicly available.

26. Legal Basis: Authority for the actions proposed in this Notice may be found in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303.

27. Recording, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule: The proposals may reduce existing requirements.

28. Federal Rules that Overlap, Duplicate, or Conflict with the Proposed Rules: None.

29. Description, Potential Impact, and Number of Small Entities Involved: Approximately 1,500 existing television broadcasters of all sizes may be affected by the proposals contained in this decision.

30. Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives: The proposals contained in this NPRM are intended to simplify and ease the regulatory burden currently placed on commercial television broadcasters.

31. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared the above Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of this Notice of Proposed Rulemaking, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the

Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1981).

32. This Notice of Proposed Rule Making is issued pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary